



Fighting for Inclusive Educational Policies for Children with Disabilities – One Family’s Story

by Pam Gilligan (Kim’s Mom)

The Law Center represents many children with disabilities in special education matters in the Philadelphia area. Kim Gilligan, a little girl who miraculously survived a devastating illness, is one of them. Law Center attorney Judith Gran resolved Kim’s case by negotiation rather than litigation. Negotiated solutions are better for everyone, especially families who wish to preserve a cooperative, non-adversarial relationship with their children’s school district. Yet advocacy efforts such as this, in which no legal proceeding was initiated, do not generate fees. Our ability to provide such services depends entirely upon the generous support of individuals.

For my family, time and everything else is measured as either before or after Kim’s illness. Before one day in February 1999 you might have called us a typical American family. My husband, Mike, and I had been blessed with three beautiful daughters. I didn’t think much

about my youngest, Kim, not feeling well enough to go to school that day. She was headachy and had been recovering from the same garden variety virus that had been passed around our family.

What I didn’t know until I discovered her board stiff and unresponsive was that our Kimmy was a very seriously ill little girl. Kim was rushed to the emergency room where she underwent a series of tests that included a spinal tap, CAT scan, MRI, and EEG. That day ended with Kim lying in a pediatric ICU unit on a respirator with a life threatening seizure disorder, viral encephalitis.

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The Gilligan Family

Law Center Battles the Federalist Society Over Right of Children, Disabled and Minorities To Enforce Federal Laws

While seeking to vindicate the rights of children to health care services required by Congress, of students with disabilities for educational services, and of minorities to be free from disproportionate polluting facilities and unequal school funding, the Law Center has found itself arrayed against not only the states who have been failing to comply with federal law, but with the Federalist Society, which has been assisting the states to assert that they are immune from any enforcement action brought by victims of their deliberate indifference and far from benign neglectfulness.

Now that one of the founders of the Federalist Society, Theodore Olsen, is Solicitor General of the United States, the role of independent non-governmental organizations like the Law Center in protecting the right of citizens to enforce federal law against the states will grow in importance.

Whether federal courts will abandon enforcement of Acts of Congress intended to bind states is the most significant civil rights battle facing our country. NPR’s Nina Totenberg says, “the Supreme Court seems to be engaged in something of a state’s rights revolution.”

Because the Law Center has been on the cutting edge of national efforts to enforce civil rights laws it has found itself at the center of this controversy.

In the case of *Jim C. v. State of Arkansas*, Tom Gilhool was successful in holding the line in the Eighth Circuit Court of Appeals, widely known as one of the three circuits most hostile to federal power being used on behalf of individual rights. *Jim C.* was a case of a student with disabilities claiming he was discriminated against by Arkansas in the conduct of its educational

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Message from the Law Center's Chief Counsel

Michael Churchill

The Law Center has been busy this last year litigating and negotiating the right to non-discriminatory funding for Philadelphia schools, environmental justice in Camden and North Philadelphia, the right to challenge state failures to provide health care services to needy children, and the rights of students with disabilities to receive an effective education. These are all matters of great impact on the quality of life not only of the plaintiffs but the entire community. It is more important than ever, at a time when we are calling for common sacrifice in the face of common dangers, to show that we are providing equality of opportunity for all. This is a task for all of us and I hope that we will have your support.

Law Center Battles Federalist Society...

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programs which were supported with federal money. Initially, a panel of three judges ruled that Section 504 of the Rehabilitation Act, which prohibits recipients of federal money from discriminating against persons with disabilities, was unconstitutional and unenforceable against state recipients. Tom sought reconsideration before the entire ten person court



The outcome of the Law Center's Westside Mothers v. Haveman will impact the delivery of health care services to millions of Michigan's poor and working poor children.

and then prevailed, 6 to 4. The dissent argued that Congress should not have the power to set such broad conditions on the use of its money because it intruded on the independence of states to say they could not discriminate in the conduct of any program which was run by the state agency receiving the funds.

Arkansas sought review of this decision by the Supreme Court and the Law Center filed a brief opposing that review. On the last day of the term this summer the Court agreed to let the en banc decision stand without further review, finalizing the Law Center's victory.

Not yet finally decided is another Law Center case which is being

watched all around the country: *Westside Mothers v. Haveman*. This is a case brought with the law firm of Dechert Price & Rhoads to require the state of Michigan to comply with the federal Medicaid law, enacted as part of the Social Security Act, to deliver effective health care to eligible children. Congress provides between 50 and 80 percent of the cost of the program. Nevertheless the state of Michigan, aided by a Federalist Society lawyer, argued that federal law is not enforceable against a state because a quid pro quo agreement between the national government and the states is not really a law but only a contract which is not enforceable by the victims of the non-compliance. Despite seventy years of case law completely incompatible with this argument, Judge Cleland adopted it and the case is now on appeal to the Sixth Circuit Court of Appeals. Former Solicitor General Drew Days authored an amicus brief on our side.

In July Nina Totenberg of NPR reported that, "If Judge Cleland's decision is ultimately sustained, say advocates of the poor, the practical effect will be the end of Medicaid as a source of guaranteed health benefits. And dozens of health organizations from Catholic Charities to the American Academy of Pediatrics have weighted in to warn of dire consequences for the nation's health care system. If the Cleland decision is ultimately upheld, it will likely also mean an end to enforcement mechanisms for all manners of other federal spending programs."

The lawyer who made the argument for sovereign immunization for states complying with their contracts with the national government, Jeffrey Sutton, has now been nominated by President Bush to that national government's Sixth Circuit Court of Appeals. Because of his argument in this case and in the *Garrett* case in the Supreme Court overturning parts of the Americans with Disabilities Act his nomination has been strongly opposed by the disabilities community and civil rights lawyers.

Related issues of individual citizens' rights to enforce state obligations to comply with federal laws have arisen in the Law Center's environmental justice cases in Chester and Camden, and in the state educational funding case *Powell v. Ridge*, all which we brought on behalf of racial minorities. The Law Center's position has been upheld in each, with the Camden case pending in the Third Circuit. ■

Law Center Advances Environmental Justice

Under the leadership of Jerome Balter the Law Center's environmental project has brought what a Columbia University professor told the New York Times is "the most important environmental justice case ever decided, by a wide margin." *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, seeks a remedy for DEP approval of a slag grinding plant in a community which is 90% minority and which already is saturated with polluting facilities, including a regional incinerator, a regional sewage treatment plant, and two superfund sites.

"We might be poor, and we might be mostly black, Spanish and Vietnamese, but we are humans," long-time resident Bonnie Sanders told National Public Radio. Residents already suffer from a disproportionately high rate of asthma and other respiratory ailments that would be exacerbated by the operation of a facility which will emit sixty tons of inhalable particulates into the air. The facility will also generate 77,000 diesel truck trips a year to and from the proposed plant.

The case, brought in conjunction with Camden Regional Legal Services and the San Francisco based Center on Race, Poverty and the Environment, has attracted national attention because it seeks to enforce federal regulations – enacted pursuant to Title VI of the Civil Rights Act of 1964 – which prohibit recipients of federal financial assistance from operating their programs in a manner which has a discriminatory impact. The case asserts that NJDEP has a pattern of disproportionately locating polluting facilities in predominately minority communities.

Judge Stephen Orloffsky agreed that the regulations are enforceable, that plaintiffs had shown that New Jersey had a discriminatory pattern, and that New Jersey had made no investigation of whether this facility complied with regulations; consequently in April he ordered New Jersey to conduct an investigation of the cement plant's compliance and enjoined the opening of the plant which had cost \$50 million to construct. No federal court had ever found a state had violated these regulations before, much less actually enforced the regulations!

The owner, St. Lawrence Cement Company, frantically petitioned to the Third Circuit and a month later the injunction was lifted pending a final

decision on the appeal. Briefs seeking to overthrow Judge Orloffsky's ruling were filed by the U.S. Chamber of Commerce, the Commonwealth of Pennsylvania and the American Road and Transportation Building Association.

On our side, supporting briefs were filed by the ACLU, Natural Resource Defense Council, NAACP and Lawyers' Committee For Civil Rights. ■

Defending Civil Rights Laws for Women

When the new administration was facing nomination battles in the Senate its Justice Department nominees all promised they would enforce current civil rights laws. In Philadelphia that promise lasted less than 9 months. In September DOJ threw in the towel on its four year old battle against SEPTA's discrimination against women as transit officers, leaving the burden to the Law Center to challenge practices which have resulted in 643 men and only 9 women eligible for hiring in the last 10 years!

SEPTA has spent hundreds of thousands of dollars to defend its practice of refusing to hire women as transit officers by claiming that it is necessary for safety despite the fact that no other police or transit organization in the country, including the FBI, and the DEA, uses a running test as restrictive as SEPTA's to screen applicants. Former New York transit police head, Michael O'Connor testified it was not necessary to exclude women through such a test in order to increase safety on the subways.

The Law Center filed its brief in the middle of September and received the support of the National Center of Women and Policing, the National Women's Law Center and the ACLU Women's Rights Project which filed a friend of court brief on our client's behalf. The case will be argued in the winter and decided next spring by the Third Circuit Court of Appeals.

One Family's Story...

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Kim was to spend the next five weeks on life support in intensive care.

After countless tests, treatments and prayers, including the Last Rites of our faith, Kim miraculously pulled through. While Kim had regained much of her speech and basic functioning, her illness left her with some neurological impairment.

I fought for Kim medically, never leaving her side in the four months of her hospital stay. Upon her release I was prepared to continue to fight to ensure that all of her medical needs were met. I was not, however, prepared for the struggle to provide for Kim's educational needs. Kim was left with some deficits cognitively and testing demonstrated that she had special needs. Although from a mom's perspective, I hasten to add, if you saw Kim today running around and interacting with other children, her impairment would not be obvious. She is, however, designated a child with disabilities entitled by law to receive special educational services –

services which her school district did not wish to provide.

Because of the Public Interest Law Center of Philadelphia and disabilities rights attorney Judith Gran, Kim eventually received all of the services and supports necessary to meet her individual educational needs. Judith spent countless hours negotiating with the school district and worked with educators and administrators to design an Individual Educational Plan for Kim that placed her in a regular second grade classroom while providing the therapies, an aide, special instruction in reading and math and a full time nurse on site. The Law Center was an invaluable resource for us, a family in crisis and in need of help maneuvering our way through the special education system.

We feel indebted to the dedicated doctors and medical staff who treated Kim and we feel equally indebted to Judith Gran and the Public Interest Law Center of Philadelphia for their unending support. Each caring person who has entered our lives on behalf of Kim has helped share the struggles that come with having a chronically ill child and helps renew our family's hopes for a bright future for Kim. ■

Preventing Blight...



Daylight dumping hit the North Philadelphia community around Hunting Park and Erie this summer when the City permitted a company to haul in a 100 foot high mountain of concrete demolition waste from several housing projects. This was followed by the operation of a grinding machine turning the waste into cement for resale, inundating the community with dust and debris, and generating a high level of noise.

Reclaiming Our Neighborhood (RON), a community group organized to protest this intrusion, turned to the Law Center's Jerome Balter for legal and technical assistance. Discovering that no air permits had been issued, Balter arranged for RON to sponsor a meeting attended by community residents, city officials, the Pennsylvania Dept. of Environmental Protection and the hauler. Although some officials from the DA's office and the City initially intended to permit the grinding to continue ("just until the pile is gone"), the strong community opposition coupled with the threat of a lawsuit to pursue fines for each day of operation without a permit was enough to persuade the hauler to cease operations.

Two days after the community meeting truckers started hauling the demolition waste to another location! RON and the Law Center are still negotiating with the state and city to levy some fines against the company, with the money to be channeled back into the community to support the local public school. ■

PILCOP Selected To Do National Disabilities Study

The National Council on Disabilities selected the Law Center to conduct a national study on how states are implementing the requirement of the Americans with Disabilities Act to provide opportunities for community placements for all people with disabilities able to handle and benefit from integration into the community. The Supreme Court upheld this mandate in its *Olmstead* decision in 1999. The study will look at a representative cross section of the states to identify the significant barriers to community placements which exist and will examine how these barriers differ across types of disabilities, gender, ethnic groups and socioeconomic status. The comprehensive report is expected to be finished by the end of January.

UpDates...

■ Twenty thousand police officers in Pennsylvania will be trained by the end of this year in how to recognize persons with disabilities and how to interact appropriately with them as a result of a Law Center case. The training curriculum was developed with the participation of advocates for persons with epilepsy, autism, mental retardation, Alzheimer's disease and physical disabilities. Barbara Ransom negotiated this matter with the Pennsylvania Municipal Police Officers Education and Training Commission on behalf of a man who was beaten in his Upper Darby home by inadequately-trained police officers responding to a 911 call for medical assistance. Ms. Ransom also successfully settled claims against the Harrisburg Police Department on behalf of an African American man with Downs Syndrome who was twice forcibly subdued on the street by officers who had not received training on how to deal with persons with disabilities. The settlement includes changes in department procedures and damages.

■ Trial and briefing in the suit to develop community placements and services for the residents of Connecticut's Southbury institution have been completed. A decision is expected this winter.

■ The Law Center's experts completed their reports and discovery will be completed by the end of this year in the Gaskin class action against the Commonwealth for failing to ensure that children with disabilities are receiving a meaningful and inclusive education as mandated by the Individuals with Disabilities Act.

■ The District Court in California approved certifying our wage equalization case, *Sanchez v. Johnson*, as a class action case on behalf of all persons who are institutionalized and could be in community placements.

■ The District Court in Arkansas approved certifying two classes in the Bradley case against the state for failing to provide sufficient persons with knowledge about best practices in educating persons with high functioning autism.

■ The state Supreme Court declined to hear our appeal on behalf of a foster mother who was refused the right to challenge the failure of the trial court to hear any evidence before approving removal of a long term foster child. The Superior Court 2 to 1 held she did not have standing to raise the issue.

Improving Philadelphia's Schools

Access to effective education is a basic civil need for any child in today's society, and a system of effective education is a vital necessity for any region's economic viability. For those reasons improving the academic performance of Philadelphia's public schools for its 210,000 mostly minority students has been a central objective of the Law Center's work for the last decade.

Unfortunately, Philadelphia is still being asked to educate its kids for \$2,000 less than the average suburban district. Its class sizes remain the highest in the state – 50% higher than in the suburbs. The state has major culpability for the underfunding not only of Philadelphia schools but of all minority schools in the state. Philadelphia would have received \$450 million per year more from the state if funded on the same basis as comparable white districts, according to economist Anita Summers. Nevertheless the state is now embarked on a risky, unproven attempt to improve academic performance by privatization without closing the fiscal gap with the suburbs or the discrimination gap with the comparable white districts.

Perhaps it is just coincidence that only districts with a majority of African-American and Latino students – Philadelphia and Chester-Upland – are the subject of the state's experimentation with turning public schools over to private entrepreneurs seeking to make a profit, but it is a fact that makes it necessary to examine closely what is happening.

Although the state has drawn thanks for agreeing to put up half the money (\$75 million) that the District needs to continue operating at its current level, this does not represent any increased level of operations: no additional teachers, no reduction in class size, no new books, no new anything that was not already budgeted last year. The gap between the programs the District has and the programs it needs, as set forth in the Educational Improvement Plan approved by the state just this last March, remains. The District estimates the additional cost at over \$350 million.

Additional state dollars of this magnitude are not possible without a reform of the property tax funding system for the entire state, helping

the 360 underfunded rural and urban districts throughout the state as well as Philadelphia. That is why the Law Center has been working with state-wide coalitions to reform the state educational funding system.

Philadelphia, however, is not a district like Chester, Newark or Jersey City where patronage and cronyism have driven costs out of sight. The state paid over \$500,000 five years ago to Price Waterhouse to dissect the District's finances and to recommend cost saving measures. Forty million in savings were implemented by the Hornbeck administration. Are there really \$225 million more which Price Waterhouse missed or will the savings Edison projects come out of programs for the children?

It should not be overlooked that the \$45 million a year proposed to be paid to Edison repre-

sents substantial dollars and would by itself be enough to staff reducing class size in grades one to three from 32 per class to less than 20 per class!

As the Edison drama unfolds the Law Center will continue to keep its eye on the fiscal ball and on whether the changes will actually make a difference to classroom instruction. We will push for resolution of our federal lawsuit, put on hold by the state and city, to determine if, as our expert asserts, the state has wrongfully distributed its educational funding in a discriminatory manner, depriving Philadelphia of \$450 million per year. And we will continue to play a leadership role in developing public understanding for the need to change Pennsylvania's system of state and local funding for public education. ■



The Law Center welcomes its newest board members, Kenneth M. Kulak and David W. Hornbeck. Mr. Kulak presently works as an attorney at Morgan, Lewis & Bockius where he practices energy law and advises on e-commerce issues. Prior to joining Morgan Lewis, Ken was a trial attorney at the Department of Justice and a law clerk for the late U.S. District Judge Raymond J. Broderick. Mr. Hornbeck, an education consultant, currently writes and works with citizens throughout Pennsylvania to promote fair learning opportunities for all of the state's children. Mr. Hornbeck previously served as the Superintendent of the Philadelphia School District for six years, stepping down in 2000.

Disabilities Attorney Max Lapertosa resigned in September to return to his home in Chicago. During his three years at the Law Center Max developed with Thomas Gilhool our California litigation challenging the wage inequality for community service providers. Max played an important role in the Southbury and Bradley litigation as well as in a number of special education cases.

Jerome Balter will be honored with the Rutgers Law School's Martin Luther King, Jr. award to honor his tireless commitment to environmental justice.

Christine Petersen began work as an intern at the Law Center in September. A native of Denmark where she was a practicing attorney, she received a Masters of Law degree last June from the University of Chicago.

Congratulations to Angelina Williams, Law Center legal intern and recent graduate of James Beasley Law School at Temple University, for passing the Pennsylvania Bar Exam!



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Over the next two years the Law Center will participate in an intellectual exchange project sponsored by the Human Rights Protection Committee of the Japanese Federation of Bar Associations. This project, which seeks to advance the rights of persons with disabilities in both countries by exploring each nation's legal and non-legal based strategies of protecting this population, grew out of a series of seminars hosted by the Law Center last April for seven lawyers from Japan.

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